HON'BLE THE CHIEF JUSTICE SHRI G.S. SINGHVI
AND
HON'BLE SHRI JUSTICE C.V. NAGARJUNA REDDY

Writ Petition No. 4435 of 2007

Between:

Sri Puneet Rastogi

… Petitioner

And

The Commissioner of Income Tax,
Andhra Pradesh – V, Hyderabad
and two others

… Respondents

:: O R D E R ::

Counsel for the petitioner: Shri K.L. Rathi

Counsel for the respondent: Shri B. Narasimha Sarma

August 6, 2007

Per G.S. SINGHVI, CJ

This is a petition for quashing orders dated 30.11.2005, 24.3.2006 and 15.12.2006 passed by the Income Tax Appellate Tribunal, Hyderabad Bench Á (for short 'the Tribunal') in I.T.A.No. 224/Hyd/2005, M.P.No. 10/Hyd/2006 and M.P.No.49/Hyd/2006, respectively.

The petitioner is engaged in the trading of surgical goods in the name and style of "Monarch Enterprises". For the assessment year 2001-2002, the petitioner filed return on 31.10.2001 declaring a total income of Rs. 1,92,940/-. The Assessing Officer, vide his order dated

29.3.2004 passed under Section 143 (3) of the Income Tax Act, 1961 (for short 'the Act'), assessed him at an income of Rs. 3,19,460/-, which included the additions made under the following heads:

"1. Unexplained credit balance	Rs. 10,000/-
2. Sales promotion expenses	Rs. 3,000/-
3. Sales promotion expenses	Rs. 5,300/-
4. Unaccounted credit notes of M/s. Casil Health Products Limited	Rs. 75,316/-
5. Unaccounted credit notes of M/s. Thomas Baker Chemicals Limited	Rs. 32,900/-"

On appeal, Commissioner of Income Tax (Appeals)-VI, Hyderabad deleted the addition of Rs. 3000/- made under the head – sales promotion expenses, but upheld the remaining additions. The further appeal preferred by the petitioner was dismissed by the Tribunal vide its order dated 30.11.2005. M.P.No. 10/Hyd/2006 filed by the petitioner under Section 254 (2) of the Act was dismissed by the Tribunal on 24.3.2006 and review petition filed by him, which was registered as M.P.No. 49/Hyd/2006, was dismissed vide order dated 15.12.2006.

The petitioner has questioned order dated 30.11.2005 mainly on the ground that while dismissing the appeal preferred by him against the appellate order, the Tribunal did not consider the detailed explanation given in the written submissions and material paper book filed on 16.11.2005, which was accompanied by a number of documents. He has challenged the other two orders by contending that even though there was mistake apparent in order dated 30.11.2005, the Tribunal refused to rectify the same without assigning any tangible reason.

In the counter filed by the respondent, an objection has been raised as to the maintainability of the writ petition on the ground that

the petitioner has an effective alternative remedy under Section 260A of the Act, which he has failed to avail. On merits, the respondent has averred that the Assessing Officer had made additions because the petitioner could not explain the expenses and unaccounted credit notes.

Sri K.L. Rathi, learned counsel for the petitioner argued that the remedy available to the petitioner under Section 260A cannot be treated as an effective alternative remedy because appeal under that section is entertained only if substantial question of law arises for determination by the High Court and not otherwise. He submitted that the errors committed by the Tribunal in appreciating the points raised at the hearing of the appeal and the documents produced by the petitioner may not constitute substantial question of law within the meaning of Section 260A and, therefore, he should not be non-suited on the ground of availability of alternative remedy.

Sri B. Narasimha Sharma, learned counsel for the respondent, argued that the writ petition should not be entertained by presuming that the appeal filed by the petitioner under Section 260A will necessarily be dismissed. He further argued that if the appellant feels no substantial question of law arises for consideration by this Court, even a writ of certiorari cannot be issued under Article 226 of the Constitution of India.

We have considered the respective submissions. In our opinion, the writ petition is liable to be dismissed on the ground of availability of alternative remedy to the petitioner under Section 260A of the Act.

In **A.V. Venkateshwaran v. R.S. Wadhwani**[1], the Constitution Bench of the Supreme Court, while reiterating that the rule of

alternative remedy does not bar the jurisdiction of the High Court to entertain the writ petition, but is a rule evolved by the superior Courts for exercise of their discretion, observed as under:

> "The wide proposition that the existence of an alternative remedy is a bar to the entertainment of a petition under Art.226 of the Constitution unless (1) there was a complete lack of jurisdiction in the officer or authority to take the action impugned, or (2) where the order prejudicial to the writ petitioner has been passed in violation of the principles of natural justice and could, therefore, be treated as void or non est and that in all other cases, Courts should not entertain petitions under Art. 226, or in any event not grant any relief to such petitioners cannot be accepted. The two exceptions to the normal rule as to the effect of the existence of an adequate alternative remedy are by no means exhaustive, and even beyond them a discretion vests in the High Court to entertain the petition and grant the petitioner relief notwithstanding the existence of an alternative remedy. The broad lines of the general principles on which the Court should act having been clearly laid down, their application to the facts of each particular case must necessarily be dependent on a variety of individual facts which must govern the proper exercise of the discretion of the court, and in a matter which is thus pre-eminently one of discretion, it is not possible or even if it were, it would not be desirable to lay down inflexible rules which should be applied with rigidity in every case which comes up before the court."

In **Thansingh Nathmal v. Superintendent of Taxes**[2], another Constitution Bench of the Supreme Court considered the question relating to exercise of discretion by the High Court in entertaining a writ petition despite the availability of alternative remedy and held:

> "The jurisdiction of the High Court under Article 226 of the Constitution is couched in wide terms and the exercise thereof is not subject to any restrictions except the territorial restrictions which are expressly provided in the Articles. But the exercise of the jurisdiction is discretionary: it is not exercised merely because it is lawful to do so. The very amplitude of the jurisdiction demands that it will ordinarily be exercised subject to certain self-imposed limitations.

Resort that jurisdiction is not intended as an alternative remedy for relief which may be obtained in a suit or other mode prescribed by statute. Ordinarily the Court will not entertain a petition for a writ under Article 226, where the petitioner has an alternative remedy, which without being unduly onerous, provides an equally efficacious remedy. Again the High Court does not generally enter upon a determination of questions which demand an elaborate examination of evidence to establish the right to enforce which the writ is claimed. The High Court does not therefore act as a court of appeal against the decision of a court or tribunal, to correct errors of fact, and does not by assuming jurisdiction under Article 226 trench upon an alternative remedy provided by statute for obtaining relief. Where it is open to the aggrieved petitioner to move another tribunal, or even itself in another jurisdiction for obtaining redress in the manner provided by a statute, the High Court normally will not permit by entertaining a petition under Article 226 of the Constitution the machinery created under the statute to be bypassed, and will leave the party applying to it to seek resort to the machinery so set up."

In **Baburam v. Zilla Parishad**[3], the Supreme Court reiterated the rule of alternative remedy in the following words:

"When an alternative and equally efficacious remedy is open to a litigant he should be required to pursue that remedy and not to invoke the special jurisdiction of the High Court to issue a prerogative writ. It is true that the existence of a statutory remedy does not affect the jurisdiction of the High Court to issue a writ. But, the existence of an adequate legal remedy is a thing to be taken into consideration in the matter of granting writs and where such a remedy exists it will be a sound exercise of discretion to refuse to interfere in a writ petition unless there are good grounds therefor. But it should be remembered that the rule of exhaustion of statutory remedies before a writ is granted is a rule of self imposed limitation, a rule of policy, and discretion rather than a rule of law and the Court may therefore in exceptional cases issue a writ such as a writ of certiorari, notwithstanding the fact that the statutory remedies have not been exhausted."

Their Lordships then carved out the following two exceptions to the rule of alternative remedy:

1) where proceedings are taken before a Tribunal under a provision of law, which is ultra vires to the Constitution,
2) where the impugned order has been made in violation of the rules of natural justice.

In **Titaghur Paper Mills Co. Ltd. v. State of Orissa**[4], the Supreme Court stated the rule of alternative remedy in the following words:

> "Where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute alone must be availed of. Under the scheme of the Orissa Sales Tax Act, there is a hierarchy of authorities for granting redress. The petitioners had an equally efficacious alternative remedy by way of an appeal to the Prescribed Authority under sub-section (1) of Section 23, then a second appeal to the Tribunal under sub-section (3)(a) thereof, and thereafter in the event the petitioners get no relief, to have the case stated to the High Court under Section 24 of the Act. The Act provides for an adequate safeguard against an arbitrary or unjust assessment, such as right to prefer appeal under Section 23 (1) and to apply for stay of recovery under clause (a) of the second proviso to Section 13 (5). Thus the Act provides for a complete machinery to challenge an order of assessment, and the impugned orders of assessment can only be challenged by the mode prescribed by the Act and not by a petition under Article 226."

In **Champa Lal v. I.T. Commissioner**[5], **J.M. & Co. v. Agricultural I.T. Officer, Assam**[6], **C.I.T. v. Ramendra Nath Ghosh**[7], **Swadeshi Cotton Mills Co. Ltd., v. Union of India**[8], **Gujarat University v. N.U. Rajguru**[9], **State of H.P. v. Raja Mahendra Pal**[10], **L.L. Sudhakar Reddy v. State of A.P.**[11], **State of Bihar v. Jain Plastics & Chemicals Ltd.,**[12], **Harbanslal Sahnia**

v. Indian Oil Corporation Ltd.,[13], **ABL International Ltd., v. Export Credit Guarantee Corporation of India Ltd.,**[14] the Supreme Court applied the rule of alternative remedy in different situations. In **Harbanslal Sahnia** (supra), the Supreme Court considered the situations in which the High Court can exercise power under Article 226 of the Constitution of India notwithstanding the availability of alternative remedy and held:

> "The rule of exclusion of writ jurisdiction by availability of an alternative remedy is a rule of discretion and not one of compulsion. In an appropriate case, in spite of availability of the alternative remedy, the High Court may still exercise its writ jurisdiction in at least three contingencies: i) where the writ petition seeks enforcement of any of the fundamental rights; (ii) where there is failure of principles of natural justice; or (iii) where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged. (See **Whirlpool Corpn. v. Registrar of Trade Marks {(1998) 8 SCC 1}**. The present case attracts applicability of the first two contingencies. Moreover, as noted, the petitioners' dealership, which is their bread and butter, came to be terminated for an irrelevant and non-existent cause. In such circumstances, we feel that the appellants should have been allowed relief by the High Court itself instead of driving them to the need of initiating arbitration proceedings."

In **Central Coalfields Ltd. v. State of Jharkhand**[15], the Supreme Court approved the judgment of the High Court of Jharkhand, which refused to interfere with the order passed by the competent authority under the Bihar and Orissa Public Demands Recovery Act, 1914 on the ground of availability of alternative remedy and observed:

> "……It is no doubt true that according to the appellant Company the certificate proceedings could not have been initiated under the Bihar and Orissa Public Demands Recovery Act, 1914, in view of the provisions of the Coal Bearing Areas (Acquisition and Development) Act, 1957, the Mines and Minerals (Regulation and

> Development) Act, 1957 and also the Coking Coal Mines (Nationalisation) Act, 1972. But it also cannot be overlooked that the action has been taken under the Bihar and Orissa Public Demands Recovery Act, 1914 and the appellant Company was directed to make payment. The said order is subject to appeal under Section 60 of the said Act. A reading of the order dated 17-11-1999 passed by the Certificate Officer makes it clear that before taking the action, an opinion of the Advocate General of the State of Bihar was sought by the respondent. Referring to the provisions of the Coking Coal Mines (Nationalisation) Act, 1972, the Advocate General opined that such amount could be claimed by the State Government from the appellant Company. Reference was made to Sections 6 and 7 of the said Act and it was observed that the State Government had power to make demand of rent from the appellant Company. In view of the above position, it cannot be said that the learned Single Judge as well as the Division Bench had committed an error of law in dismissing the petitions and appeals by allowing the appellant to avail of an alternative remedy of filing appeals……"

The petitioner's case does not fall in any of the three exceptions enumerated in the judgment of the Supreme Court in **Harbanslal Sahnia**'s case (supra). It is neither the pleaded case of the petitioner nor the learned counsel argued that the Tribunal did not have the jurisdiction to decide the appeal preferred against the appellate order and the application filed by him under Section 254 (2) of the Act. It is also not the petitioner's case that the impugned orders are ultra vires the provisions of the Constitution. The petitioner has also not challenged the vires of any law enacted by the legislature or the delegated legislation. Therefore, it is not possible to agree with Shri Rathi that the remedy of appeal available to his client under Section 260A is not an effective alternative remedy.

In the result, the writ petition is dismissed leaving the petitioner free to avail remedy of filing appeal under Section 260A of the Act.

G.S. SINGHVI, CJ

C.V. NAGARJUNA REDDY, J

August 6, 2007
Ams.

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[1] AIR 1961 SC 1506
[2] AIR 1964 SC 1419
[3] AIR 1969 SC 556
[4] (1983) 2 SCC 433
[5] AIR 1970 SC 645
[6] AIR 1970 SC 1980
[7] (1972) 4 SCC 379
[8] AIR 1981 SC 818
[9] AIR 1988 SC 66
[10] (1999) 4 SCC 43
[11] (2001) 6 SCC 634
[12] (2002) 1 SCC 216
[13] (2003) 2 SCC 107
[14] (2004) 3 SCC 553
[15] (2005) 7 SCC 492